RG 271: Internal Dispute Resolution – are enforceable regulatory guides the way of the future?

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Authors: Andrea Beatty (/authors-tag/andrea-beatty), Chelsea Payne (/authors-tag/chelsea-payne), Chloe Kim (/authors-tag/chloe-kim)

Service: Banking & Finance (/services/banking-finance) | Banking & Finance Litigation (/services/banking-finance-litigation) | Regulatory Compliance & Investigations (/services/regulatory-compliance-investigations)

Released on 30 July 2020, RG 271 outlines the updated requirements for how financial firms should deal with consumer and small business complaints under their internal dispute resolution (**IDR**) process. RG 271 will replace *RG 165 Licensing: Internal and external dispute resolution* (**RG 165**), providing more in-depth guidance on how financial firms should deal with retail customers when there is a dispute. ASIC has provided a deadline of 5 October 2021 for industry to comply with the new IDR standards and guidelines, with RG 165 being repealed from 5 October 2022. This article will identify some key enforceable provisions under RG 271 and the significant implications of breaching them, and a future where ASIC's regulatory guides will include enforceable provisions.

Background

ASIC sought feedback through public consultation by releasing Consultation Paper 311 *Internal dispute resolution: Update to RG 165* on 15 March 2019 concerning a proposed update of RG 165. The responses received were directed towards further guidance regarding complaints, small businesses, IDR timeframes and the content of IDR responses, customer advocates, managing systemic issues, enforcing draft RG 165 and transitional arrangements.

The update to RG 165 was also encouraged by the findings from ASIC's on-site surveillance of the IDR process observed at the big four banks and AMP which had initially commenced to monitor whether they were complying with their regulatory requirements (**Close and Continuous Monitoring Program**). The results from the Close and Continuous Monitoring Program encouraged more stringent procedures for IDR, after ASIC monitors found significant "deficiencies" and "delays" in the banks' disputes and complaints processes.[1] Although the in-person surveillance has been halted due to COVID-19, the results so far have provided ASIC with great insight and encouraged the regulatory body to renew and update IDR standards.[2]

With the increased levels of financial hardship and consumer vulnerability resultant from the COVID-19 pandemic, ASIC considers it essential that IDR performance is significantly improved.

RG 271 updates

Instrument

RG 271 was released at the same time as the *ASIC Corporations, Credit and Superannuation (Internal Dispute Resolution) Instrument 2020/98* (https://www.legislation.gov.au/Details/F2020L00962) (**Instrument**). The Instrument clarifies the new enforceable standards applicable to IDR procedures.

The Instrument which will apply from 5 October 2021 importantly identifies:

- the new standards and requirements that ASIC has made and approved for the IDR procedures of financial firms;
- requirements for written reasons for decisions about complaints in relation to regulated superannuation funds, approved deposit funds and retirement savings accounts; and
- that financial firms must comply with their IDR procedures.

A contravention of the IDR obligations could result in civil penalty consequences as it may constitute an offence.

If the entity is a financial services licensees, a contravention of the requirement to comply with the IDR procedures in s 912A(2)(a)(i) and s 1017G(2)(a)(i) of the *Corporations Act 2001* (Cth) (**Corporations Act**) will attract civil penalty provisions. A contravention of this section will attract a maximum of 50,000 penalty units for body corporates amounting to $11.1 million.

Credit licensees are also bound by s 47(1) of the *National Consumer Credit Protection Act 2009* (Cth) to have an IDR procedure that complies with the standards and requirements made or approved by ASIC and relates to disputes concerning the licensee or representatives' credit activities. If this occurs, it will attract 5,000 penalty units amounting to $1.11 million.

As at the time of writing, the Instrument has been placed on the Senate Disallowable Instruments List (https://www.aph.gov.au/Parliamentary_Business/Bills_Legislation/leginstruments/senate-dissallowable-instruments). If successfully disallowed, it could leave potential uncertainty

RG 271 contains "enforceable paragraphs" identifying which sections ASIC can pursue civil action to ensure financial firms comply with the regulatory guide. These guides alongside the enforceable Instrument indicate the types of regulatory guidance ASIC will release, focusing on compliance and enforceability.

In the *Australian Securities Investments Commission v Westpac Banking Corporation* trials (**Westpac trials**), ASIC relied upon their own interpretation of the responsible lending obligations under the *National Consumer Credit Protection Act 2009* (Cth), as demonstrated in RG 209 *Credit licensing: Responsible lending conduct* to argue Westpac had breached their responsible lending obligations. This differed from the judiciary's interpretation of the law, leading to the regulatory body's loss at the Full Federal Court. Accordingly, ASIC implementing enforceable provisions in their regulatory guides will ensure situations do not arise where there is inconsistency between ASIC's guidance on legislation and judiciary's application of the law. Especially as ASIC's enforceable regulatory guides will be supplemented by a legislative instrument, it indicates an attempt to ensure greater consistency between ASIC and the judiciary.

Follow through

ASIC has indicated that it will continue to conduct further consultation into the IDR data reporting regime which had been recommended in 2018 through the *Ramsay Review into dispute resolution and complaints framework* (https://treasury.gov.au/review/review-into-dispute-resolution-and-complaints-framework). The regulatory body will also continue monitoring the big four banks and AMP remotely through their Close and Continuous Monitoring Program, ensuring they are both supervising and supporting the firms.[3]

[1] ASIC Commissioner Sean Hughes, Speech, 'ASIC's approach to enforcement after the Royal Commission', 36th Annual Conference of the Banking and Financial Services Law Association, 30 August 2019.

beatty/)

Andrea Beatty

Partner

Sydney

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Adelaide

Level 16
70 Franklin Street
Adelaide SA 5000

T +61 8 8205 3333
F +61 8 9932 7313

Brisbane

Level 26, Riparian Plaza
71 Eagle Street
Brisbane QLD 4000

T +61 7 3220 7777
F +61 8 9932 7313

Melbourne

Level 23
459 Collins Street
Melbourne VIC 3000

T +61 3 8665 5555
F +61 8 9932 7313

Perth

Level 29,
77 St Georges Terrace
Perth WA 6000

T +61 8 9219 3600
F +61 8 9932 7313

Sydney

Level 23, Governor Macquarie Tower
1 Farrer Place
Sydney NSW 2000

T +61 2 9253 9999
F +61 8 9932 7313

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